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APPELLATE REVIEW IN ENGLAND AND THE UNITED STATES — WHO BEARS THE ULTIMATE BURDEN?*

*Howard L. Greenberger***

INTRODUCTION

Comparative procedural studies, even between countries with similar legal systems and a common language, are fraught with more than the normal measure of pitfalls. Serious students of comparative problems must continually guard against value judgments based upon ingrained prejudice. In the context of this article, an effort is required of the English lawyer to refrain from characterizing the contingent fee system, so prevalent in the United States, as champertous, unethical conduct and dismissing it on that basis alone. On the other hand, it is imperative that those unfamiliar with the English system of court costs eschew the American preconception that the "cost system" favors the wealthy and as such is inherently unfair.

The fact that comparative studies are not mere academic exercises has become increasingly clear. For, just as the student of foreign languages develops a deeper understanding and mastery of his native tongue, so does the lawyer benefit who compares and contrasts legal institutions with his own. Preconceptions are challenged; half-truths exposed; and theoretical bases considered and reconsidered. Primarily then, comparative studies permit a respite from the every-day analysis of cases and statutes and encourage reflection in depth.

In a partial attempt to answer the question posed by the subject, this article considers court costs as they are treated in England and the United States and the contingent fee system as it exists in the latter. Comparison will also be made of the legal assistance programs in operation in the two countries as they bear directly on the question of expense of appellate review.

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** Associate Professor of Law, New York University School of Law; Member of the District of Columbia, Pennsylvania and Supreme Court Bars.

ENGLISH SYSTEM OF COSTS

The theory underlying the English system of costs would appear to be based on the proposition that litigation should be the last resort of all parties and that he who has injured his neighbor should reimburse him when called upon to do so. If the putative defendant refuses to honor the demand and thus necessitates the employment of solicitors and barristers, he should be called upon to make his neighbor whole.¹ Damages alone will not accomplish this result; however, damages plus costs will.²

Undoubtedly, the most significant difference between the English and American practice with regard to costs is the treatment accorded attorney's fees.³ As a general rule the prevailing party in the English courts may look forward to receiving, from his unsuccessful adversary, the expense incurred on behalf of his solicitor and barrister. This generalization is, of course, subject to numerous qualifications, some of which will be treated in this paper.⁴

Obviously, some objective standard is called for or the prevailing party might incur phenomenal expense and ultimately saddle his adversary with the burden. Recognizing this need, the English courts developed a number of objective standards to cover varying factual situations.⁵ One English case suggests that ultimately six different

1. Lord Cranworth stated in *Clarke v. Hart*, 6 H.L.C. 633, 667 (1858): "I think that the general principle upon the subject of costs is, and ought to be . . . that the costs ought never to be considered as a penalty or punishment, but merely as a necessary consequence of a party having created a litigation in which he has failed." Quoted with favor in *Foster v. Great Western Railway*, 8 Q.B.D. 515, 517 (1882).

2. Costs include all those expenses of litigation which one party has to pay to the other and must be distinguished from "fees" which have to be paid by each litigant to the officers of the court. Fees ultimately become part of the bill of costs presented on taxation and hence some of the resulting confusion. The distinction is important for fees normally must be paid to the Court prior to any court action, while costs are taxed and become due only after unsuccessful litigation.

3. England—solicitor and barrister (or counsel); United States—attorney.

4. An important qualification that deserves extended discussion is the use of the power to tax or award costs to facilitate the administration of justice, i.e. shift litigation to the County Courts; discourage procrastination, etc. See notes 14-18 for a partial collection of cases.

5. Despite the controls exercised by the Taxing Masters and the courts, the costs are substantial. In *Graigola Merthyr Co., Ltd. v. Swansea Corp.*, 45 T.L.R. (1929), the unsuccessful plaintiff had to pay more than \$350,000. The costs in the case of *Green v. Levis and B.B.C.*, which took up four weeks of the court's time, were estimated at \$85,000-\$110,000. *Daily Herald*, May 28, 1955, p. 1, cols. 6, 7, and 8. The highly publicized case of *Champagne Association of Great Britain v. Costa Brava Wine Co., Ltd.*, resulted in a cost order of \$40,000. *Newsweek*, December 8, 1958, p. 41, cols. 3 and 4.

standards evolved.⁶ In any event, the Supreme Court Committee on Practice and Procedure (Evershed Committee) recognized three standards that have won general acceptance.⁷

Taxation of the bare minimum costs that would be reasonable, necessary and proper to expend in furtherance of the litigation is termed party and party taxation.^{7A} In the vast majority of cases, the costs are so taxed. As early as 1875, the rule was laid down, "that the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them."⁸ The Evershed Committee recommended this test for party and party taxation.

The second common standard has become known as solicitor and client taxation.⁹ It is nothing more or less than party and party taxation on a more generous scale, i.e. both as to the size and nature of the items included.¹⁰ This standard is applied in a number of varying situations which have been summarized as follows:¹¹ (1) where the costs are payable out of a fund wholly owned by the party

6. *Gibbs v. Gibbs*, [1952] 1 All E.R. 952.

7. Committee on Supreme Court Practice and Procedure, Final Report, Cmd. No. 8878 (1954), § 721 (popularly known as the Evershed Report and hereinafter cited as *Ev. Rep.*).

7A. "[O]n a taxation on that basis [i.e. party and party] there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed." Supreme Court Costs Rules, R. 28 (2).

8. *Smith v. Buller*, L.R. 19 Eq. 473, 475 (1875).

9. The Evershed Committee advocated the substitution of the term "full action costs" in order to distinguish this concept from solicitor and own client taxation with its strikingly dissimilar incidents. *Ev. Rep.* § 720.

In the promulgation of the Supreme Court Costs Rule, 1959, effective January 1, 1960, the recommendation was accepted in substance; however, the standard was entitled "common fund basis of taxation."

"The Court in awarding costs to which this rule applied may in any case in which it thinks fit to do so order or direct that the costs shall be taxed on the common fund basis." Supreme Court Costs Rules, 1959, R. 4 (3).

"On a taxation on the common fund basis, being a more generous basis than that provided for by paragraph (2) of this rule [i.e. party and party basis], there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and paragraph (2) of this rule shall not apply; and accordingly in all cases where costs are to be taxed on the common fund basis the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested shall be applied, whether or not the costs are in fact to be so paid." *Id.* R. 4 (4).

10. *Giles v. Randall*, [1915] 1 K.B. 290, 295 (C.A.).

11. *Gibbs v. Gibbs*, *supra* note 6.

paying; (2) where a solicitor is acting for a person under a disability; (3) where the costs are payable out of a fund in which both parties were interested; (4) where one or both of the parties is legally aided.¹²

Judge Parker, in *Peel v. London and North W. Rwy. Co. (No. 2)*, [1907], 1 Ch. 607, 613, drew the distinction between the two standards as follows:

One is the question of doing the litigation . . . as cheaply as a reasonable man can do it, because possibly someone else may have to pay the expense, and the other is a question what a man spending his own money would reasonably be expected to do in the particular circumstance of the case.

The difference in standard appears to result, on the average, in a 15% higher bill under solicitor and client taxation.¹³

It is questionable whether the third form of taxation—solicitor and own client—has any relevance to a discussion of court costs, for it is never utilized to measure the contribution of the unsuccessful party. Rather, it is the standard applied by the Taxing Office and ultimately the courts where a solicitor has presented his own client with a bill that represents the total amount due him arising out of his professional services and disbursements, including any fees paid barristers. Prima facie, the matter is one of bargain between solicitor and client, and the solicitor is entitled to charge for all matters he in fact has done on the client's behalf and upon his instructions. Since, however, the solicitor, by virtue of his position and experience, might conceivably overreach his client, the Taxing Masters and the courts exercise a certain degree of supervision and only permit "proper" charges, i.e. charges that are not exorbitant.¹⁴ This standard of taxation approaches indemnification and is distinctive in that regard. Although solicitor and own client taxation has often been considered an integral part of the English system of costs, it is apparent that it is separable therefrom and, in fact, is present in some measure throughout the United States.

12. Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, C. 51, p. 650.

13. SACHS, LEGAL AID 136 (1951).

14. "Generally speaking, the decision of the Master on taxation is final: he is the sole judge of the fact, whether the business has been done, and of the proper charge to be made for it; and it is further his duty to inquire whether the business was required to be done; for if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the Master to protect the client from any charge in respect of such proceedings. The court will only interfere where the Master acts upon some mistaken principle." *Alsop v. Lord Oxford*, 1 My. & K. 564 (1833), quoted with favor in *Estate of Ogilvie*, [1910] p. 243, 244 (C.A.).

As a general rule, costs abide the ultimate result and thus an appeal may well result in a new direction as to costs.^{14A} The bill drawn by the solicitor who represents the prevailing party will include not only the disbursements and fees incurred in the primary action, but those relating to the appeal.¹⁵ The fact that this general rule is subject to exceptions is illustrated by *Cooper v. Cooper*, [1882], 13 A.C. 88 (H.L.), where the House of Lords denied costs on an appeal which was brought and successfully argued upon a point not presented to the Court below either by argument or evidence.¹⁶ Successful appellants have also been deprived of their costs (1) where they were only partially successful on appeal,¹⁷ (2) where they have been guilty of objectionable conduct, e.g. undue delay in the court below caused by presentation of irrelevant evidence,¹⁸ (3) where they succeeded on appeal only because the law had been changed after the judgment below,¹⁹ and (4) where they succeeded on fresh evidence.²⁰ In all such cases, according to the facts and circumstances, the appellant may receive only his costs of the appeal, and not his costs below, or he may receive no costs in either court, or only part of his costs.

UNITED STATES

In the United States, on the other hand, the prevailing party to an action may reasonably expect to bear his own attorney's fees both in the trial and appellate courts.²¹ The theoretical justification for this rule would appear to be based on the pragmatic view that American lawyers take of the law in action. Clear cut cases are seldom

14A. "In the case of an appeal the costs of the proceedings giving rise to the appeal, as well as the costs of the appeal and of the proceedings connected with it, may be dealt with by the Court hearing the appeal. . . ." Supreme Court Costs Rules, 1959, R. 4 (2).

15. *Arnot's Case*, 36 Ch. D. 702 (1887); *Ex Parte Hauxwell*, 23 Ch. D. 626 (1883); *Chard v. Jervis*, 9 Q.B.D. 178 (1881); *Hussey v. Horne—Payne*, 8 Ch. D. 670 (1878).

16. *Accord*, *Donald Campbell & Co. Ltd. v. Pollak* (No. 2), [1927] A.C. 804; *Simpson v. Crowle*, [1921] 3 K.B. 243.

17. *Elliott v. Lord Rokeby*, 7 App. Cas. 43 (1881); *Williams v. Stanley Jones & Co.*, [1926] 2 K.B. 37; *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520; *Ex parte Cooper*, 10 Ch. D. 313 (1878).

18. *Diamantide v. Grosvenor Securities, Ltd.*, [1937] 1 All E.R. 703; *Borthwick v. Evening Post*, 37 Ch. D. 465 (1888).

19. *Luther v. Sagor*, [1921] 3 K.B. 532.

20. *Ex parte Hauxwell*, 23 Ch. D. 626, 643 (1883).

21. The prevailing party will normally receive court costs but these are nominal in amount and are usually limited to a reimbursement for fees paid to the Court.

present in practice, and, therefore, one should not be unduly penalized if he chooses to litigate his "rights." The "twenty-twenty vision of hindsight" is felt to be an insecure base upon which to build a system of costs, other than nominal, i.e. exclusive of attorney's fees.

State Statutes—Costs

Consistency is the exception in a country the size of the United States which contains so many diverse jurisdictions. However, it is rather surprising to find that two of our newer states, Oregon and Alaska, have chosen to ignore the generally accepted rule that attorney's fees are not included within taxable costs. In fact, both states have statutory provisions of general application that result in procedures that are substantially similar to that existent in England. The statutes define "costs" as including "certain sums by way of indemnity for . . . attorney fees in maintaining the action or suit, or defense thereto . . ."²² The standard set forth in the legislation is one of "reasonableness"—the fee to be fixed in the discretion of the court and awarded to the prevailing party²³ (including the State and the United States, at least in Alaska).²⁴ The clerks of court initially sit as taxing masters, however, when there is a dispute as to an item of costs, the matter is referred to the court.²⁵ Finally, costs on appeal abide the result and are allowed by the appellate court.²⁶

Far more states have special statutory provisions under which attorney's fees are recoverable as costs in certain classes of actions or proceedings, or against certain classes of persons. Within this category are stockholders' derivative suits²⁷ and suits against railroad companies,²⁸ insurers²⁹ and employers.³⁰

22. ORE. REV. STAT. tit. 2, § 20.010; ALASKA COMPILED LAWS ANN. § 55-11-51.

23. ORE. REV. STAT. tit. 2, § 20.010-20.095; ALASKA COMPILED LAWS ANN. § 55-11-55.

24. Reynolds v. Wade, 16 Alaska 221, 140 F. Supp. 713 (1956), rev'd. on other grounds, 249 F.2d 73 (9th Cir. 1957); Appeal of Spracher, 17 Alaska 144, 150 F. Supp. 555 (1957).

25. ORE. REV. STAT. tit. 2, § 20.210; ALASKA COMPILED LAWS ANN. § 55-11-58.

26. ORE. REV. STAT. tit. 2, § 20.310; ALASKA COMPILED LAWS ANN. § 55-11-66.

27. N.Y. GEN. CORP. LAW §§ 63-68. That the attorney's fees allowed by the Court may be substantial is illustrated by the recent case of Inter. Rwy. of Cent. America v. United Fruit Co. where the New York Court of Appeals allowed an attorney's fee of \$2,850,000. N.Y. Times, December 6, 1961, Sec. 2, p. 74, col. 3.

28. Missouri, Kan. & Tex. Ry. v. Cade, 233 U.S. 642 (1914).

29. Fidelity Mutual Life Assoc. v. Mettler, 185 U.S. 308 (1902); Germania Fire Ins. Co. of N.Y. v. Bally, 19 Ariz. 580, 173 Pac. 1052 (1918).

30. Vogel v. Pekoc, 157 Ill. 339, 42 N.E. 386 (1895).

Federal Statutes—Costs

In the federal domain, a few statutes grant the courts discretion to award reasonable attorney's fees both at the trial and appellate levels. However, these provisions are far from uniform and their coverage is limited.³¹ Illustrative of these provisions is section 15 of the Clayton Act, 15 U.S.C., which has received considerable attention in the reports:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, *including a reasonable attorney's fee*. (Emphasis supplied).

The very vagueness of the standard has resulted in some considerable amount of litigation. At least two, and perhaps three, views have emerged. District Judge Wyzanski in *Cape Cod Food Products, Inc. v. National Cranberry Association*, 119 F. Supp. 242 (D. Mass. 1954) stated "that a losing defendant must pay what would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer." [p. 244] On the other hand, Circuit Judge Major, speaking for the court in *Milwaukee Town Corp. v. Loews, Inc.*, 190 F.2d 561 (7th Cir. 1951), held that the agreement between attorney and client was wholly immaterial and that the court should allow a fee that is reasonable in the light of the history of the litigation. In *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865 (D.D.C. 1955), reversed on other grounds, 243 F.2d 418 (D.C. Cir. 1957), District Judge Holtzoff approached the problem in a similar manner and indicated that the court should consider the magnitude and complexity of the issues involved, the standing of counsel at the bar, the skill exercised and the result achieved. In addition, he emphasized that it was merely his duty to determine what contribution should be made by the defendant toward the fees of plaintiffs' counsel; he did not conceive it to be the function of the court to fix the fee that counsel should charge his client, and then assess that against the defendant. The third approach to this

31. Fair Labor Standards Act, 29 U.S.C. 216 (only to the successful plaintiff); Housing and Rent Act, 50 U.S.C.A. App. 1895 (only to the successful plaintiff); Patent Act, 35 U.S.C. 285 (in exceptional cases); Copyright Act, 17 U.S.C. 116 (except when the action is brought by or against the United States); Clayton Act (Antitrust), 15 U.S.C. 15 (only to the successful plaintiff).

problem was proposed by District Judge Clary in *Noerr Motor Freight, Inc. v. Eastern Railroad President's Conference*, 166 F. Supp. 163 (E.D. Pa. 1958), reversed on other grounds, 365 U. S. 127 (1961). After reviewing the abovementioned cases, he declined to follow either line of reasoning stating merely "that they do represent the poles at some point between which the true standard lies." [p. 170] Judge Clary stated the test he would apply as follows: "What, considering *all* the factors in the case, would be a reasonable charge for the services of plaintiff's counsel?" Presumably that figure would be assessed against the defendant.

The similarity between the English and American problems in the area of "reasonable attorney's fees" is striking, albeit it pertains to a small segment of American law. It is worthy of note that in none of the cases set forth above was any reference made to the English experience.

Contingent Fee Practice

The seemingly harsh American rule on court costs is somewhat ameliorated by the existence of the contingent fee system in almost all state and federal jurisdictions.³² Apparently the only jurisdiction to prohibit contingent fees and declare them champertous is Maine.³³

The contingent fee system, whereby the attorney's fee is contingent upon a recovery, has been sanctioned by the Supreme Court of the United States since 1884: "Contracts by attorneys for compensation in prosecuting claims against the United States [are] not void because the amount is made contingent upon success, or upon the sum recovered. And the well-known difficulties and delays in obtain-

32. Note, 72 U.S.L. Rev. 671, 672 (1938).

33. ME. REV. STAT. Ch. 135, § 18 which states: "Whoever . . . brings, prosecutes or defends, or agrees to bring, prosecute or defend any suit at law or in equity upon shares, shall be punished by fine of not less than \$20 nor more than \$1,000, or by imprisonment for not more than 11 months."

Hinckley v. Giberson, 129 Me. 308, 151 Atl. 542 (1930); Burnham v. Heselton, 84 Me. 578, 24 Atl. 955 (1892). Compare, Manning v. Perkins, 85 Me. 172, 26 Atl. 1015 (1892).

The courts of Massachusetts also treat the contract for a contingent fee as void. However, a contingent fee in Massachusetts is champertous only if it is to be paid solely from the amount recovered, without any personal liability of the client. If the client is personally—though contingently—liable, the agreement is valid. Holdworth v. Healey, 249 Mass. 436, 144 N.E. 386 (1924); Blaisdell v. Ahern, 144 Mass. 393, 11 N.E. 681 (1887).

ing payment of just claims justifies a liberal compensation in successful cases, where none is to be received in case of failure."³⁴

It has been asserted that the contingent fee system was a by-product of the Industrial Revolution and the proliferation of industrial accidents resulting therefrom.³⁵ With the adoption of Workmen's Compensation Laws, the original need decreased but by then the contingent fee had spread to other fields. Today, contingent fee arrangements are prevalent in many fields of litigation—bankruptcy, condemnation, tax, shareholders' derivative suits, claims against the government, and, most frequently, in personal injury actions.³⁶ However, courts have held contingent fee arrangements void as against public policy in divorce actions.³⁷

In discussing the contingent fee system, Professor Max Radin summarized its merits and deficiencies:

The contingent fee certainly increases the possibility that vexatious and unfounded suits will be brought. On the other hand, it makes possible the enforcement of legitimate claims which otherwise would be abandoned because of the poverty of the claimants. Of these two possibilities, the social advantage seems clearly on the side of the contingent fee. It may in fact be added by way of reply to the first objection that vexatious and unfounded suits have been brought by men who could and did pay substantial attorneys' fees for that purpose.³⁸

The Canons of Professional Ethics of the American Bar Association have recognized contingent fees since 1908. Canon 13 presently states that:

A contract for a contingent fee where sanctioned by law should be reasonable under all the circumstances of the case, including the risk and the uncertainty of the compensation, but should always be subject to the supervision of a court as to its reasonableness.

34. *Taylor v. Bemiss*, 110 U.S. 42, 45 (1884).

For another view on the subject, see 32 MISS. L.J. 375 (1961) which reports the following colloquy:

"Client: What is this contingent fee business?"

"Lawyer: Well, to put it very simply, it means this: If you lose the case, I don't get anything, but if you win, you don't get anything."

35. BROWN, *LAWYERS AND THE PROMOTION OF JUSTICE* 209 (1938).

36. DRINKER, *LEGAL ETHICS* 177 (1953).

37. *Newman v. Frietas*, 129 Cal. 283, 61 Pac. 907 (1900).

38. Radin, *Contingent Fees in California*, 28 CALIF. L. REV. 587, 589 (1940).

As in the case of the solicitor's charge to his own client, the contract for a contingent fee is initially a matter for negotiation between the attorney and his client. However, in this instance as well, the courts exercise a modicum of supervision due to the disparity in experience and position. In most jurisdictions, if the client contests the fee arrangement, the standard applied by the court would appear to be identical to that applied by the Taxing Office when considering solicitor and own client taxation, i.e. only a "proper" charge is allowed.³⁹ However, statutory limitations are present in specific areas, e.g. bankruptcy,⁴⁰ workmen's compensation,⁴¹ and administrative law.⁴²

Recently there has been an effort to control the size of the contingent fee in personal injury and wrongful death actions.⁴³ Effective July 1, 1960, all attorneys practicing in Appellate Divisions 1 and 2 of the State of New York (New York City and its environs) became subject to a new rule that requires the filing of every contingent fee contract with the court in claims and actions for personal injury and wrongful death.⁴⁴ In addition, the rule provides alterna-

39. *Taylor v. Bemiss*, *supra* note 34; *Buckley v. Surface Transp. Corp.*, 277 App. Div. 224, 98 N.Y.S.2d 576 (1950). [Also see *Contingent Fees in Personal Injury and Wrongful Death Actions in the United States*, Appendix I, p. 20, Institute of Judicial Administration (1957).]

40. 66 Stat. 426, 11 U.S.C. § 102 (1953).

41. 62 Stat. 984, 28 U.S.C. § 2678 (1950).

42. *Shipley, The Contingent Fee*, 23 J.B.A.D.C. 651, 655 (1956).

43. Verdicts in personal injury actions vary considerably, however, some idea of their size may be given by the table that follows:

| Personal Injury Verdicts or Awards | | |
|---|-------------|-------------|
| Exceeding \$50,000 Throughout the United States | | |
| (Caveat: A case may involve more than one plaintiff.) | | |
| | 1959 - 1960 | 1960 - 1961 |
| (thousands of dollars) | | |
| 50 - 99 | 101 | 97 |
| 100 - 149 | 29 | 50 |
| 150 - 199 | 23 | 16 |
| 200 - 299 | 20 | 18 |
| 300 - 399 | 5 | 6 |
| 400 - 499 | 4 | 3 |
| 500 - 999 | 2 | 3 |
| One Million and over | 2 | 0 |
| | <hr/> | <hr/> |
| | TOTAL 186 | TOTAL 193 |

Belli, *Matters of General Interest: Verdicts or Awards Exceeding \$50,000*, 25 NACCA L. J. 372 (May 1960); Belli, *Matters of General Interest: Verdicts or Awards Exceeding \$50,000*, 26-27 NACCA L. J. 445 (Nov. 1960, May 1961).

44. Rule 4, App. Div. 1 and 2, Special Rules Regulating Conduct of Attorneys [effective July 1, 1960], Vol. 12, Gilbert-Bliss, N.Y. CIV. PRAC. (1938 amend. 1961). *Gair v. Peck*, 6 N.Y.2d 98, 161 N.E.2d 43 (1959).

tive methods for computing the maximum permissible contingent fee that an attorney may negotiate with his client. The first approved method (Schedule A) is a fee computed on the following scale:

- (i) Fifty percent on the first \$1,000 of the sum recovered,
- (ii) Forty percent on the next \$2,000 of the sum recovered,
- (iii) Thirty-five percent on the next \$22,000 of the sum recovered,
- (iv) Twenty-five percent on any amount over \$25,000 of the sum recovered.

The alternative permissible method (Schedule B) is a percentage of recovery not exceeding thirty-three and a third percent. Where exceptional circumstances pertain, an attorney may apply to the court for an increased fee under Schedule A but not under Schedule B. Under both methods, the percentage is computed on the net sum recovered after deducting taxable costs and disbursements.

LEGAL AID

Manifestly, the expense of litigation, more especially appellate litigation, is prohibitive for many persons in both England and the United States. In recognition of the need for legal assistance by the poor and the duty of the bar to provide it, various programs of legal aid have developed. These programs play an increasingly important role in our judicial systems and their effect on the economics of appellate advocacy is considerable.

England—Civil

In England, legal aid in civil cases is covered by the Legal Aid and Advice Act of 1949.⁴⁵ The act is rather comprehensive in character and worthy of detailed study by the American Bar.

The primary responsibility for administration of the system has been delegated to the Law Society, the representative organization of solicitors. The Law Society manages the system on behalf of the state and accomplishes the task through the organization of a number of Local and Area Committees. The Local Committees are primarily made up of solicitors and act upon the applications for legal aid initially. Any appeals from their decisions are taken to the Area

45. 12 & 13 Geo. 6, c. 51.

Committees, which, in addition, act as tribunals of first instance with regard to appellate proceedings.⁴⁶

The eligibility for legal aid was rather severely regulated by the original Legal Aid legislation.⁴⁷ However, with the enactment of the Legal Aid Act of 1960,⁴⁸ more individuals became entitled to free legal aid and an even larger number are now eligible for partial assistance. The means of each applicant are assessed by the National Assistance Board and, after taking into consideration a number of permissible deductions, it eventually computes "disposable income" and "capital" for each applicant. If his disposable income does not exceed £ 250 (\$1250)⁴⁹ per year and his disposable capital does not exceed £ 125 (\$625) the applicant receives completely free legal aid.⁵⁰ On the other hand, the applicant whose disposable income exceeds £ 700 (\$3,500) per year is not entitled to legal aid nor are those whose disposable capital exceeds £ 500 (\$2,500), unless it is determined by the Local Committee that the estimated costs of the proceedings are likely to exceed the maximum contribution under the "contribution formula."⁵¹ The contribution formula provides that an applicant may receive partial legal assistance where his disposable income or capital exceed the maximum figures set for entirely free legal aid. In operation, the applicant is required to make a contribution which may not exceed one-third of the amount by which his disposable income exceeds £ 250 (\$1,250) per year. He is also required to pay by way of contribution the whole of the amount by which his disposable capital exceeds £ 125 (\$625).⁵²

Not surprisingly, the Act restricts the matters that may form the subject of a claim for legal aid.⁵³ The excepted proceedings include defamation, breach of promise of marriage, loss of services due to rape or seduction, alienation of affection suits and election petitions. A more striking omission in this day of administrative law is the

46. Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51; Marsh, *Legal Aid and the Rule of Law: A Comparative Outline of the Problem*, II J. INTER. COMM. OF JURISTS 95 (1960).

47. 12 & 13 Geo. 6, c. 51.

48. 8 & 9 Eliz. 2, c. 28.

49. Although the official exchange rate is \$2.80 per £ 1, in terms of real purchasing power it seems more realistic to utilize a rate of \$5 per £ 1. This rate was suggested to the author by Geoffrey Crowther, formerly Editor of the Economist.

50. 12 & 13 Geo. 6, c. 51, § 3, as amended by 8 & 9 Eliz. 2, c. 28, § 2.

51. 12 & 13 Geo. 6, c. 51, § 51, § 2, as amended by 8 & 9 Eliz. 2, c. 28, § 1.

52. 12 & 13 Geo. 6, c. 51 § 3, as amended by 8 & 9 Eliz. 2, c. 28, § 2.

53. Parts I and II, First Schedule, Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51.

absence of any provision for legal aid before administrative tribunals or arbitrators.

Although the original Legal Aid Act limited the remuneration of solicitors and barristers to 85% of their normal remuneration in similar non-aided actions,⁵⁴ pursuant to authority contained in the 1960 Act this figure was raised to 90%.⁵⁵

The Legal Aid program is financed from a number of sources. The Fund is augmented by contributions from partially assisted persons and the costs recovered from unsuccessful non-legally aided parties. Due undoubtedly to the preliminary screening by the Local Committees, an amazingly high percentage of legally assisted persons are successful. The state supplies the "deficit," which has averaged less than 50% of the total expenditure. During the first eight and a half years of operation the total cost to the state was approximately \$28 million.⁵⁶

However, one other hidden cost of the program should be mentioned. Not only must the non-assisted opponent of an assisted person pay full costs into the Fund if he loses, but, if he wins, he can only recover from the assisted person such costs as the court considers reasonable. In view of the limited resources of the assisted person and the fact that his assets have already been scrutinized by the Local Committee, the recoverable costs are effectively limited to the amount of contribution the assisted person has had to pay into the Fund, if any. Although the rule appears harsh and unfair, the non-assisted party may not sue the Legal Aid Fund which has, in effect, been responsible for the suit.⁵⁷ Thus, it is apparent that the non-assisted parties who are successful, albeit infrequently, indirectly contribute to the financial support of the program.⁵⁸

54. Third Schedule, §§ 1 and 2, 12 & 13 Geo. 6, c. 51.

55. 8 & 9 Eliz. 2, c. 28, § 2; Legal Aid (General) Regs., 1960 (S.I. 1960, No. 2369).

56. Marsh, *op. cit. supra* note 46.

57. Legal Aid (General) Regulations, 1950, Reg. 17 (3) (a) and (b). This provision was severely criticized in an editorial published in the Sunday Times, Nov. 4, 1954, as being grossly unfair to the non-legally aided party who prevails and then may find he has little hope of collecting his costs. The editorial goes on to advocate that if no better plan can be put forward "the only fair thing is to have the costs of both sides paid out of the legal aid fund." p. 6, col. 1.

58. The Committee on Legal Aid and Advice in Northern Ireland, recently recommended the introduction of a program of legal aid that is similar to that in force in England. Cmd 417 (1960). However, the committee recommended that successful, unaided litigants should have their costs out of the Legal Aid Fund.

England—Criminal

Legal Aid in the criminal field is provided for by the Poor Prisoners' Defense Act, 1930,⁵⁹ Part II of the Legal Aid and Advice Act, 1949⁶⁰ (effective March 14, 1960),⁶¹ and the Criminal Appeal Act, 1907.⁶²

Pursuant to these acts an accused person may obtain legal aid in the preparation and conduct of his defense at all stages preparatory to trial and at trial if two conditions are satisfied:

- (1) if it appears desirable in the interests of justice that he should have legal aid; and
- (2) if it appears that his means are insufficient to enable him to obtain it. If there is doubt as to his means, the question is to be resolved in his favor.⁶³

Applications are made to the committing magistrate or magistrates who determine, in light of the tests set forth above, whether aid should be granted. Apparently it is seldom granted for preliminary investigations before the magistrates. However, once the magistrates have decided to commit for trial, the question is considered anew, if assistance has been requested. Where it appears likely that the accused will plead not guilty, the defense certificate is normally granted entitling the accused to a solicitor as well as a counsel. A solicitor is normally chosen from a panel; however, if the accused expresses a wish for a specific solicitor he normally will receive his choice.⁶⁴

When it appears that the accused will plead guilty, the defense certificate may well be denied. Practice on this point varies considerably and, in any case, the accused may apply once again to the trial court for legal aid pending trial. If this request is also denied, he may renew it at the trial and counsel will be supplied at that stage.

If the accused loses at the trial stage and was the recipient of a defense certificate, his solicitor may, by virtue of a recently implemented section of the Legal Aid and Advice Act of 1949, prepare his notice of appeal or leave to appeal.⁶⁵ The certificate expires ten days after conviction, the statutory deadline for appeals. This recent modification fails to cover those accused who were unrepresented in

59. 20 & 21 Geo. 5, c. 32.

60. 12 & 13 Geo. 6, c. 51.

61. Legal Aid and Advice Act, 1949 (Commencement No. 7) Order 1960 (S.I. 1960, No. 257).

62. 7 Edw. 7, c. 23.

63. Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51, § 18 (1).

64. Poor Prisoners' (Counsel and Solicitor Rules, 1931) S.R. & O. 1931 No. 582, rules 1 and 2.

65. 12 & 13 Geo. 6, c. 51, § 22 (4).

the trial court or represented merely by counsel, for it makes no provision for the drafting of the notice of appeal by counsel.

Once the defense certificate has expired, legal aid authority vests in the Court of Criminal Appeal, which applies substantially the same standard as that followed by the trial court.⁶⁶ Since the application for leave to appeal is almost always decided without oral argument, legal aid is seldom, if ever, granted at that stage. If leave to appeal is granted, legal aid is given in cases of appeal against conviction, appeal against sentence (if a principle of law is involved) and where the court is considering an increase in the sentence. Legal aid on appeal is normally limited to counsel.

Where a legal aid certificate has been granted, costs are paid out of the Legal Aid Fund established by the Legal Aid and Advice Act of 1949.⁶⁷ Solicitors and barristers are paid fees that the Law Society has determined represent fair remuneration for the work actually and reasonably done.⁶⁸

United States—Civil

The Legal Aid services in the United States vary considerably and although the last decade has been marked by substantial progress, there still remains a formidable challenge.⁶⁹ The National Legal Aid and Defender Association, in cooperation with the Committee on Legal Aid Work of the American Bar Association, provides the stimulus, experience and initial financing for new legal aid services. Most importantly, it has been in the forefront of the effort to awaken the bar and the community generally to the need for adequate support for legal aid programs.⁷⁰

Historically, the growth of legal aid in civil cases has been independent of the growth of legal aid in criminal cases. In fact, the latter form of assistance has been indelibly labeled "legal defender," and hence the name, National Legal Aid and Defender Association.⁷¹ Due to their different origins and rates of growth, they deserve separate treatment.

As of June 1, 1960, there were 209 legal aid offices in operation throughout the United States.⁷² They fall into five main categories:

66. Criminal Appeal Act, 1907, 7 Edw. 7, c. 23.

67. 12 & 13 Geo. 6, c. 51 § 22.

68. Poor Prisoner's Defense (Legal Aid Certificate) Regs., 1960, (S.I. 1960, No. 261) Reg. 4.

69. Brownell, *A Decade of Progress: Legal Aid and Defender Services*, 47 A.B.A.J. 867.

70. *Id* at 870.

71. *Id* at 868.

72. BROWNELL, *LEGAL AID IN THE UNITED STATES*, Supp., 10 (1961).

(1) Independent Societies with their own governing bodies, such as the Legal Aid Society of New York, established in 1876; (2) offices conducted as departments of privately supported social agencies, such as that established in Chicago; (3) Public Bureaus, whose budget is provided by public funds; (4) Bar Association offices; and (5) Law School Clinics.⁷³

In the face of these grave differences of organization, finance, size, and demand for services, it is readily apparent that only the roughest form of generalization is possible. Of these 209 offices, 132 have salaried staff attorneys rendering service in civil cases in 126 cities having a combined population of approximately sixty-three and a half million people. In seventy-seven cities, there are Legal Aid offices operating with volunteer legal staffs serving a combined population of sixteen and a half million people. Volunteer panels of lawyers are available to twenty-three million people in 128 other communities, large and small, throughout the country.⁷⁴

The classification set forth above gives some idea as to the source of income of the Legal Aid offices. In some localities public funds are utilized, in other areas private welfare agencies support the activity and in still others the bar and the general community support the undertaking.⁷⁵ Perhaps the outstanding example of the latter category is the Legal Aid Society of New York, whose total expenditures in 1960 approximated \$600,000 and whose income from various private sources approximated \$568,000. Of this substantial sum \$178,000 was donated by law firms and individual lawyers.⁷⁶

Each society determines its own rules as to eligibility and where it draws the "poverty line," taking into consideration bank accounts, convertible assets, ownership of homes, automobiles, recent unemployment, debts and dependents. Average figures are misleading at best, for a great deal depends on the area of the country, size of the city, availability of large numbers of lawyers and the economic level of the community.⁷⁷ However, it may be stated that there has been a movement away from rigid standards of eligibility and a tend-

73. BROWNELL, *LEGAL AID IN THE UNITED STATES*, 87-122 (1951).

74. BROWNELL, *op. cit. supra* note 72, at 10-11.

75. BROWNELL, *op. cit. supra* note 72, at 62-64.

Chart III of the same source indicates that Legal Aid offices in 1959 received support from the following sources:

| | |
|-----------------------------------|-----|
| Community Chests and United Funds | 55% |
| Bar Associations and Lawyers | 12% |
| Tax Funds | 7% |
| Clients | 5% |
| Other | 21% |

76. 85th Ann. Rep., Legal Aid Society, N.Y. (1960).

77. BROWNELL, *op. cit. supra* note 73, at 66-70.

ency to repose a measure of discretion as to borderline cases with the attorney in charge of the office. This is especially true where the Legal Aid organization has become well established and is respected by the Bar.

It is regrettable to note that financial inability to employ counsel and the presentation of a legally meritorious case are not the only tests that a party must pass. Some of the existing legal aid organizations restrict their practice, refusing to handle some of the following types of cases: divorce and annulment of marriage; bankruptcy; workmen's compensation; personal injury and tort cases (even cases in which a contingent fee arrangement would not be financially feasible); adoptions; and Court cases (i.e. some offices handle no cases which require a court appearance).⁷⁸

There is little available information concerning the scope of appellate legal aid. Emery Brownell, in his book "Legal Aid in the United States," fails to discuss or even mention the topic. However, the Legal Aid Society of New York does collate such information. During the calendar year 1960 their report indicates a total of four appeals. While not altogether comparable, it should be noted that during this same year the Society received 39,931 applications for civil assistance.⁷⁹

United States—Criminal

Three general systems exist in the United States by which counsel is provided to indigent, unrepresented persons accused of crime: (1) assigned unpaid counsel serving, in response to public and professional duty; (2) assigned paid counsel, with compensation fixed by general statute or by the court; and (3) defender offices, publicly or privately financed.⁸⁰

On a nationwide basis, the latest statistics indicate that in non-capital felony cases 40.8% of the population is served by paid assigned counsel; 24.8% by public and private defenders; and 34.4% by unpaid assigned counsel or none.⁸¹ When analyzed on a county by county basis, the picture varies to some extent: 55% of the counties in the United States provide paid assigned counsel; 2.9% offer public or private defenders; and in 38.1% unpaid assigned counsel or no legal assistance is provided.⁸² As of June 1, 1960, thirty-two states compensate assigned counsel, in cases other than capital, but in six

78. BROWNELL, *op. cit. supra* note 73, at 73-76.

79. Statistical Supp. to the 85th Ann. Rep. of the Legal Aid Society (N.Y.) for the Year 1960, p. 7.

80. BROWNELL, *op. cit. supra* note 73, at 123.

81. BROWNELL, *op. cit. supra* note 72, at 13.

82. *Ibid.*

of these states the assignment is not mandatory. In four additional states, paid counsel is assigned as a matter of right only in capital offenses.⁸³

A study of criminal legal assistance has been conducted within the past year by the National Legal Aid and Defender Association and the Association of the Bar of the City of New York. The report of that study, "Equal Justice for the Accused,"⁸⁴ asserts that although in theory the assigned counsel system can provide the scope of representation which the committee believed to be desirable, it is extremely difficult for it to do so in most urban communities. The committee found that the quality of representation is not uniformly experienced, competent and zealous; investigatory and other facilities necessary for a complete defense are not provided, the system does not come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect and often does not continue through appeal. It was, however, found to possess, in theory at least, the virtue of undivided loyalty by defense counsel to the indigent defendant.⁸⁵

The existing defender offices are of primarily two kinds—public defender and voluntary defender, the former tax supported and the latter privately supported.⁸⁶ In 1960, there were 96 defender offices in operation, an increase in the past decade of 66 offices.⁸⁷ In many areas these are separately organized and financed organizations with no formal connection with the local legal aid organizations. However, in some localities, notably New York City, the organizations are merged. A significant development in the past decade is the mixed private-public service such as that established in Puerto Rico in 1952. The privately supported legal aid society receives appropriations of tax funds for the conduct of its defender program. The plan is also in operation in five cities in the continental United States.⁸⁸

The activities of the Legal Aid Society of New York are signal not only because of its long history, but because of its extensive activity in the criminal field. During 1960 the Criminal Courts Branch serviced 44,817 cases, both in the state and federal courts. The Branch

83. BROWNELL, *op. cit. supra* note 72, at 12-15; *But see*, VON MEHREN, EQUAL JUSTICE FOR THE ACCUSED (1959) Appendix (which indicates that there are only six states that do not pay counsel representing indigent defendants in capital cases—Kentucky, Louisiana, Missouri, South Carolina, Tennessee, and Utah.

84. VON MEHREN, EQUAL JUSTICE FOR THE ACCUSED (1959).

85. *Id.* at 26-29 and 62-78.

86. BROWNELL, *op. cit. supra* note 73, at 125.

87. BROWNELL, *op. cit. supra* note 72, at 12-14.

88. BROWNELL, *op. cit. supra* note 72, at 57-58.

employed 32 full-time attorneys and three investigators and has steadily expanded its area and scope of coverage.⁸⁹

The appellate activities of defender organizations are as poorly reported as the appellate activities of legal aid organizations. Fortunately, the Legal Aid Society of New York does compile such information. Although typical in many respects, the Society not only provides service in the Appellate Courts but maintains a Criminal Appeals Office. In 1960 this office handled 135 appeals, 124 to state Appellate Courts and 11 to the Federal Court of Appeals for the Second Circuit.⁹⁰ During 1961 there has been a substantial increase in the work of the Appeals Office, the office having received assignments in 232 appeals.⁹¹

CONCLUSION

It is quite apparent that there are a number of areas in which our practice and procedure could and should be improved. Certainly, our courts should be cognizant of the great body of English law on the subject of "reasonable attorney's fees." Every practitioner who faces the problem of briefing the question should study the host of English reports that have given substance to this nebulous concept. At the same time, a careful scrutiny should be made of the procedures followed in Oregon and Alaska in regard to costs. We should inquire into both the legal and sociological effects of their system for it may supply one of the answers to the problem of court congestion. The assessment of costs as an instrument in the administration of justice has hardly been considered in this country.

The growth of organized bar activity in the United States has been heralded for its potential benefit to the legal profession. Equally as important is its potential for effective reform of outmoded institutions and concepts. More vigorous self-policing of the contingent fee practice throughout the nation should be high on the list of priority activities. Prophylactic activity is a must and in that regard the New York system appears to have merit. It provides a means of self-control and self-policing to assure protection from the unfair and unscrupulous. More importantly it operates prior to any difficulties having arisen between attorney and client and thus is far superior to post-complaint discipline.

89. *Op. cit. supra* note 76.

90. *Op. cit. supra* note 79 at 36.

91. This information is based on the weekly tabulations prepared by the Chief, Criminal Appeals Office, Legal Aid Society (N.Y.).

In the area of legal aid and legal defender activities, the bar has been far too slow in assuming what is clearly an awesome burden. In far too many areas we insist on operating with a horse and buggy procedure in an urbanized, industrial society. Far worse, we often refuse to feed the horse. When one considers the almost unlimited time, energy and money that so many members of the bar give to other civic activities, it is absolutely shocking to consider their support for legal assistance activities. This fence must be mended and quickly. In the legal aid area the English bar has accepted their responsibility and found a solution—public support of a private or semi-private system. We need not choose that solution; but, if we choose to privately support legal aid and legal defender activities, we must supply adequate funds, time and effort.

Make no mistake about this matter, the funds are desperately needed and, although progress has been marked in the past decade, we are far from achieving even a semblance of adequate support, nationwide. Adequate financial support should be coupled with a re-examination of the inexplicable restrictions under which the legal assistance organizations operate. How can we justify an office that cannot accept court cases; one that will not accept personal injury cases (even those not financially feasible under a contingent fee arrangement) etc.; and although it is perfectly true that economic factors vary considerably throughout the nation, is it not high time for some basic economic standards or tests? As the American Bar Association increases its efforts to raise the economic standards of the legal profession, should the profession not be prepared, and even eager, to provide adequate representation for those at the lower economic levels of society who can not afford their services?